In the Supreme Court of the United States

October Term, 1926.

No. 468.

The First Worcester County National Bank of Worcester, a Corporation,

Appellant.

vs.

In Re Estate of Julia A. Legnard.

BRIEF OF APPELLANT.

William T. Forbes,
Counsel *for Appellant.*

Of Counsel:
Norman D. Baker.

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Ex Parte Worcester County National Bank
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Of Counsel:

Newton D. Baker.

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In the Supreme Court of the United States

OCTOBER TERM, 1928.

No. 469.

EX PARTE WORCESTER COUNTY NATIONAL BANK of Worcester, a Corporation,

Appellant.

In Re Estate of Julia A. Legnard.

BRIEF OF APPELLANT.

JURISDICTION.

In this case, in the court below, the validity of the statute of the United States was drawn in question and the decision was against its validity. The jurisdiction of the Supreme Court of the United States on this appeal is invoked under Section 237 (a) of the Judicial Code, 28 U. S. C. A., Chapter 9, Section 3441.

The final judgment upon which this appeal is predicated was entered in the Probate Court of Worcester County, Massachusetts, pursuant to the direction contained in a rescript from the Supreme Judicial Court of Massachusetts on June 14, 1928.

Under the provisions of the General Laws of Massachusetts of 1921, Chapter 211, a judgment entered in an inferior court of that State, pursuant to a rescript from the Supreme Judicial Court, constitutes a final decree and is not appealable. Boston, Petitioner 223, Mass. 36.

Under such State law and practice the judgment of the inferior court is by this Court regarded as a final decision of the highest court of the State in which a decision could be had and the writ of error to or appeal from such decision is properly directed to the inferior court. *Davis v. Cohen*, 268 U. S. 638; *Meyers v. International Trust Company*, 273 U. S. 380; *Hess v. Paulaski*, 274 U. S. 352. For a further discussion of the jurisdiction the appellant respectfully relies upon the statement filed in its behalf under the first paragraph of Rule 12.

REPORT OF THE CASE IN THE COURT BELOW.

The opinion of the Supreme Judicial Court of Massachusetts in this cause has not yet appeared in the official volumes of the Reports of that Court, but the opinion was delivered on the 30th day of May, 1928, and appears in full in 162 N. E. 217. It is also printed in the Transcript of the Record in this case at page 15.

THE QUESTION INVOLVED IN THE CASE.

The question here involved is the constitutionality of a provision contained in the Act of Congress of February 25, 1927, relating to the consolidation of state banks and trust companies with national banks, and defining the succession of the consolidated bank to the fiduciary powers of its constituents.

The statute in question, part of the so-called McFadden Bill, passed February 25, 1927, *Chapter 191, Section 1, 44 Stat. 1225*, and appearing as *12 U. S. C. A., Chapter 2, Section 34a*, follows, with the important clauses in italics and with immaterial portions omitted as indicated by asterisks:

> "Consolidation of state bank, etc., with national bank; capital stock; dissenting shareholders. *Any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, may be con-*

solidated with a national banking association located in the same county, city, town, or village under the charter of such national banking association on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association or bank proposing to consolidate, and which agreement shall be ratified and confirmed by the affirmative vote of the shareholders * * *. The capital stock of such consolidated association shall not be less than that required under existing law for the organization of a national banking association in the place in which such consolidated association is located; *and all the rights, franchises, and interests of such State or District bank so consolidated with a national banking association in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association into which it is consolidated without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises, and interest including the right of succession as trustee, executor, or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State or District bank so consolidated with such national banking association.* When such consolidation shall have been effected and approved by the comptroller * * *. No such consolidation shall be in contravention of the law of the State under which such bank is incorporated.

"*The words 'State bank,' 'State banks,' 'bank,' or 'banks,' as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.*"

On the 27th day of June, 1927, the Comptroller of the Currency issued a certificate approving the consolidation of the Merchants National Bank of Worcester, Massachusetts, a national bank, and the Fitchburg Bank and Trust

Company, a corporation organized under the laws of Massachusetts and doing business at Fitchburg in the County of Worcester. The consolidated bank bears the name of neither of its constituents, but its corporate title is Worcester County National Bank of Worcester.

Prior to this consolidation, on April 21, 1926, the Fitchburg Bank and Trust Company was appointed executor of the will of Julia A. Legnard by the Probate Court of Worcester County, Massachusetts. (R. 57). The probate was allowed on the 21st day of April, 1926. The will contains the following provision, (R. 3):

> "* * * and I nominate, constitute and appoint said Fitchburg Bank and Trust Company sole executor of this my will and request that it be not required to furnish a security or securities on its official bond as such executor."

After the consolidation, on the 11th day of February, 1928, Worcester County National Bank of Worcester attempted to file the first and final account of the Fitchburg Bank and Trust Company, as executor, covering the period between the 21st day of April, 1926, and the 9th day of February, 1928. (R. 8). The account shows that it is rendered by the Worcester County National Bank of Worcester for said Fitchburg Bank and Trust Company to June 27, 1927, and thereafter as its own account. This account further recites the consolidation above described.

The probate judge made an entry as follows:

> "I find that this account is in proper form for allowance and should be allowed as rendered if the said Worcester County National Bank, as successor, or otherwise, is executor of said will, or has the right to render said account under the laws of the United States." (R. 12).

He further found that the action required by Federal statutes to be taken by the Comptroller of the Currency

and Federal Reserve Board had been duly taken, and stated the following situation:

> "There are many estates now being administered in this County by this accountant, the Worcester County National Bank of Worcester, under a claim of right by virtue of said Acts of Congress, where the Fitchburg Bank and Trust Company was appointed administrator, executor, trustee, or in some other fiduciary capacity prior to the consolidation, and where no new appointment of said Worcester County National Bank of Worcester in place of, or as successor to said Fitchburg Bank and Trust Company has been made by decree of this court.
>
> "Without action upon said account, I report the above facts and the question of law involved, for the consideration and determination of the Full Court, as to whether the petitioner is entitled to render said account." (R. 13).

Thereafter on the 24th day of May, 1928, the Supreme Judicial Court of Massachusetts ordered that the register of probate and insolvency in the County of Worcester make the following entry in said cause in the docket of said court, viz:

> "The question reported, namely, 'whether the petitioner is entitled to render said account,' is answered in the negative. Probate Court instructed accordingly." (R. 30).

Upon the receipt of this answer and instruction, the Probate Court of Worcester County on the 14th day of June, 1928, entered upon its docket the following:

> "The foregoing account having been presented for allowance after rescript, etc., it appearing that the Worcester County National Bank of Worcester, the accountant and petitioner in this case, has not succeeded the Fitchburg Bank as executor of the will of said testatrix and is not entitled to render this account, this petition for the allowance of same is hereby dismissed." (R. 10).

From this judgment of the Probate Court of Worcester County on rescript from the Supreme Judicial Court of Massachusetts, this appeal was perfected.

THE GROUNDS OF THE JUDGMENT BELOW.

It is clear from the foregoing that the judgment complained of denies to the Worcester County National Bank *the right of succession, as executor, to the Fitchburg Bank and Trust Company.* An examination of the opinion of the Supreme Judicial Court of Massachusetts discloses that the controlling conclusions of that court were:

1. That the consolidation of the Worcester County National Bank and the Fitchburg Bank and Trust Company was not in contravention of State law.

2. That *12 U. S. C. A., Chapter 2, Sec. 34a* provided for the succession of the Worcester County National Bank as executor by operation of law and without any action by the Probate Court.

3. That to the extent that *12 U. S. C. A., Chapter 2, Sec. 34a* provides for the succession of Worcester County National Bank as executor by operation of law, the statute is in contravention of the laws of Massachusetts in that it violates Part 1 of Article 30 of the Massachusetts Bill of Rights, which prohibits the Legislative Department from exercising judicial power.

4. That to the extent that *12 U. S. C. A., Chap. 2, Sec. 34a* provides for the succession of a consolidated National Banking Association as executor by operation of law, it is unconstitutional and void:

(a) Because it constitutes an exercise of judicial power by the legislative department of the Federal Government in contravention of the Constitution of the United States.

(b) Because the statute to this extent deals with a subject over which no jurisdiction has been delegated to the Federal Government by the Constitution of the United States, but which has been wholly reserved to the states by Article 1, Section 10, and by the Tenth Amendment of the Constitution of the United States.

5. That the clause of *12 U. S. C. A., Chapter 2, Section 34a* which provides for the succession of consolidated National Banking Associations as executor, by operation of law, is so far separable that the unconstitutionality of said clause does not render the rest of the statute void.

I.

THE PRELIMINARY CONDITION IMPOSED BY 12 U. S. C. A. CHAPTER 2, SECTION 34A UPON CONSOLIDATIONS.

The clause of *12 U. S. C. A., Chapter 2, Sec. 34a* which provides that "no such consolidation shall be in contravention of the law of the state under which such bank is incorporated" merely defines the conditions upon which the statute shall apply or become operative in a particular state but in no wise limits its effect wherever it is applicable and operative at all.

By this statute Congress created authority for the consolidation of state banks and trust companies with national banks and defined the effects of such consolidation and the powers of the consolidated corporation. It then proceeded to prescribe that the authority thus granted by Congress should not be effective or applicable in any state where such consolidations would be in contravention of the state law. This was a condition precedent to the exercise of the power granted by Congress, but it was in no sense a limitation or modification of the power granted where the condition precedent to its exercise existed. The condition precedent was determinative of whether the con-

solidations should take place at all but not of what should be the effect of the consolidation or the powers of the consolidated corporation. That is, if the consolidation of such institutions were in contravention of the state law, it was not to take place at all under the authority of Congress; but where such consolidation was not in contravention of state law, the effect of the consolidation and the powers of the consolidated corporation were to be whatever Congress said in the statute.

Hence, the only question which was open to the Court below in such a case was: Is the consolidation of banking corporations and trust companies prohibited by or in contravention of the law of Massachusetts? The initial question presented is as to the applicability of the statute and not as to its constitutionality. When this initial question has been answered in the affirmative, the Court has no power to determine that the statute is inapplicable because in the opinion of the Court the statutory effect of the consolidation and the powers of the consolidated corporation may be in some particulars in contravention of state law. Congress prescribes the powers of corporations, created by it, whether by consolidation or by original creation. If the constitutional authority to consolidate is to be exercised at all, it is beyond the power of the Court to prescribe a different effect than has been laid down by Congress. It is easy to see that this must be so. Were it otherwise, national banks created by Congress to serve high public purposes would, by the absorption of state institutions, subject themselves to control by state legislatures and their powers would thereafter vary in the several states as the legislatures of the states from time to time changed their local policy.

In the instant case, the Supreme Judicial Court of Massachusetts has affirmatively determined that the consolidation is not in contravention of the law of Massachu-

setts. With the determination of the initial question in the affirmative, the sole remaining question for the consideration of the Court was whether the statute, being applicable and operative according to its terms, was within the constitutional power of Congress to enact. While the Supreme Judicial Court undertakes to determine that one of the statutory effects of the consolidation was in contravention of the laws of Massachusetts, the Court seems to recognize the immateriality of its conclusion by proceeding to pass upon the constitutionality of the Act according to its terms, which would be wholly unnecessary if the Act were inapplicable according to its terms. Since the Court has found that the consolidation is not in contravention of state law, the Act is effective according to its terms unless it is unconstitutional; and that is the question here presented for determination by this Court.

IMPORTANCE OF THE QUESTION.

If the statement of the question to be decided fails to suggest its importance and the far reaching consequences which hang upon its decision, the following observations will show that in fact the whole future of the national banking system of the United States and of the Federal Reserve System may be at stake. An important, even essential, branch of modern banking is the management of Trust Estates and the execution of fiduciary relationships of one sort and another. All the great banks of the country are either at the same time trust companies, or have subsidiary or affiliated corporations doing trust company business. Countless wills and powers are in existence designating by name trust companies as executors and donees, and every important trust company in the country is executor, administrator, trustee, or fiduciary in a great volume of current business. Clearly, the normal changes in official personnel, capital structure, and other characteristics of these

trust companies, do not, as they occur, automatically terminate the trust relationship. The only practicable rule in such matters has been followed by the courts and is established as the law, namely; that when a trust company is designated to act as a fiduciary an intention is attributed to the person or court making the selection that the relationship shall continue through all such changes unless the act of appointment itself specifically limits the duration of the appointment to the time during which no such changes take place in the Trust Company. Otherwise stated, changes allowed by law in Trust Companies, as corporations, are deemed to have been in contemplation at the time of the appointment, and the appointment is unaffected by them when they occur. Were the law otherwise, no Trust Company could safely permit any change of any kind in its structure and the accidents of death and resignation in its official personnel would both destroy the business of the company and confuse the administration of vast property interests. The right of the court or other creator of a trust to examine, from time to time, the character of the trustee, and to remove and replace a trustee whose character or characteristics have so far changed that they no longer satisfy the court's opinion as to the needs of the trust is, of course, unquestioned. This power applies as much to individual trustees as to the corporate trustees. A man appointed executor and subsequently becoming blind or mentally enfeebled may be removed by the court if his disqualification is prejudicial to the trust; but neither blindness nor mental enfeeblement automatically terminates the relationship, and so with regard to corporate trustees. They may be so changed as to lead a court to prefer, in the interests of the estate, either larger security or more highly specialized attention; but in the case of corporate trustees, as in the case of individuals, the termination of the relationship is not automatic.

Considerations of this kind have been freely applied in the state courts to state corporations; and laws authorizing consolidations of State Banks and Trust Companies, with large changes in their powers, have been held not to affect existing trusteeships, or to prevent the assumption of power as executor under wills executed previous to the consolidation and designating, by name, an institution absorbed in the consolidation with an accompanying loss of nominal identity.

The Act of Congress under consideration has followed and adopted this uniform state practice, and in order to preserve National Banks, has authorized them to consolidate with and absorb Trust Companies, with a like preservation of all the powers, rights and duties of the constituents. If it should be held that Congress may not so provide for succession by National Banks to the fiduciary duties of State Banks and Trust Companies absorbed by them, it is plain that the absorptions and consolidations will all be the other way. National banks will allow themselves to be absorbed by State banks, and there will disappear from the national system its most important members, if not, ultimately, its entire membership. The effect of this is not merely an abstract and academic defeat of a congressional policy, but the very practical destruction of the Federal Reserve System through which, since 1913, the government has regulated the issuance and supply of currency, the use of bank credit, and the development of acceptances as an aid to the promotion of the nation's international trade.

The Federal Reserve System has been before this Court a number of times; and the Federal Reserve Act and its amendment have been considered by the Court, some of the cases illustrating attempts by state legislation or otherwise to build up state banking systems as against a growing national system. *Farmers & Merchants National Bank of Monroe v. Federal Reserve Bank of Richmond*, 262

U. S. 649; *American Bank & Trust Co. v. Federal Reserve Bank*, 262 U. S. 643. This Court is, therefore, fully advised, both of the gradual development of the federal plan and of the efforts of the states to stay, if not defeat, its growth. Nor is it strange that there should be this conflict. The virtue of the Federal Reserve plan lies in the fact that it requires accumulation by member banks of real reserves, based upon the extent of their deposit liabilities. While a very large source of profit to banks under the state systems now, and under the federal system prior to the Federal Reserve Act, lay in the accumulation of mere paper reserves, thus freeing for speculative employment funds of the banks which now are required, in the case of member banks, to be segregated and kept in gold or its substantial equivalent. The vice of the banking system prior to the creation of the Federal Reserve System lay in the fact that when bank reserves came suddenly to be needed, they were found to be unobtainable, and pressure brought by the banks to recover possession of their reserves in times of stringency caused, year after year, panics and financial crises of increasing severity and destructiveness.

In this case, as in all others, security can be obtained only by some sacrifice. Congress measured the quantity of security needed by national interests and imposed the corresponding sacrifice on the member banks of the Federal Reserve System. So far as the matters of currency and bank credit are concerned, the country has been, since 1913, safe from panic; and if the Federal Reserve System can be preserved as substantially dominant in the money market, this element of the national security will be safe. If, on the other hand, there be a gradual draining away of member banks from the Federal Reserve System, national control over credit and currency will disappear, and there will gradually be built up, around and outside of the national financial structure, a larger and more powerful set

of financial agencies, which through the absence of safeguards imposed in the national interests will constantly imperil the national welfare. The tendency in this direction is already striking, if not alarming. Not only through the defection of member banks from the Federal Reserve System, but from the building up of private and corporate financial agencies outside of all banking control, which supply funds or withdraw funds from the money market, in complete irresponsibility to any control in the public interest, and it may not be fanciful to forecast a time when, in the interest of having any safety in a national financial scheme it may be necessary for Congress to take fresh and more drastic steps. For the present, however, we are concerned only with the maintenance of the agencies which Congress has established and the protection of those agencies from impairment at the hands of states, either through the offering of superior attractions in the way of liberalities of charter, or of the denial of powers to these federal agencies which Congress has deemed necessary for their effective operation.

The Federal Reserve System, under the *Act of December 23, 1913, 38 Statutes, 251*, proceeds upon the organization in Federal Reserve Districts, which geographically cover the entire country, of Federal Reserve Banks, each bank being composed of member banks, and each Federal Reserve Bank operating in its own district under the general co-ordinating control of the Federal Reserve Board, a part of the official fiscal apparatus of the nation sitting in Washington.

The Federal Reserve Banks are organized by requiring each national banking association within its district to subscribe to their capital stock a sum in proportion to its own paid up capital and surplus. The backbone of the Federal Reserve System, therefore, is the National Bank. State Banks are invited to become members of the Federal Re-

serve Banks on certain terms, and affiliations of non-member State Banks are authorized in order to spread the advantages of facilities which Federal Reserve Banks afford. But there is complete in-and-out elasticity of membership for State institutions in the Federal Reserve System. Its permanent roster of members consists of National Banks. If, therefore, the number or relative importance of National Banks in the country decreases, the Federal Reserve Banks correspondingly decrease in their influence and power in the general financial situation. If it be within the power, either legislative or judicial, of the states either to entice away National Banks by offering them charter advantages which Congress cannot extend, or to deny to National Banks, operating in the several states, advantages, the absence of which cripple them in their competition with state institutions, then the gradual disintegration of the Federal Reserve System, and the consequent destruction of the national plan is inevitable. The case is hard enough for the national plan at best. The state institutions are subjected to varying degrees of supervision, and reserve and other requirements imposed upon them vary from time to time as state legislatures may be moved. Any national plan must of necessity be more rigid in its requirements if the national plan serves national rather than local purposes. It supplies the national fiscal agency and controls the currency and credit situations which are nation-wide.

With this inescapable handicap, of greater conservatism and more drastic safeguard, the National System will, of course, find itself most popular in times of stress, and most subject to impatient criticism when fair financial breezes are blowing. This handicap the National System has been able to meet. But if it be held that National Banks, upon consolidation with state institutions, lose the fiduciary identity and business of the constituent state institutions which they absorb, if the absorption is national-wise, while

all those rich opportunities for business are preserved if the absorption is state-wise, it is clear that the National Banking System will be struck a mortal blow.*

II.

CLAUSE OF 12 U. S. C. A., CHAPTER 2, SECTION 34A, WHICH PROVIDES FOR THE SUCCESSION OF CONSOLIDATED NATIONAL BANKING ASSOCIATION AS EXECUTOR BY OPERATION OF LAW IS WITHIN THE CONSTITUTIONAL POWER OF THE CONGRESS.

A.

The legislative history of this Act conclusively demonstrates that the purpose was within the scope of the Constitution.

Section 34a, 12 U. S. C. A., Chapter 2, forms a part of the Act entitled "An Act to Further Amend the National Banking Laws and the Federal Reserve Act and for other purposes," approved February 25, 1927 (44 Statutes 1225). This Act was adopted pursuant to urgent recommendations by the Comptroller of the Currency in his Annual Reports to the Congress for the years 1924, 1925 and 1926. In his Report for 1925, the Comptroller of the Currency after reviewing the defections of National Banks to the State Systems, said at page 4:

> "These facts present a serious situation for the consideration of the Congress and I am directing your

*Note: The records of the Comptroller's office show that during the period from November 1, 1923, to the close of business on January 15, 1929, there were 467 National Banks merged or absorbed by State Banks and Trust Companies. 179 of the State Banks thus consolidating had trust powers under the statutes of the states of their creation. As to the remaining 288 State Banks the records fail to disclose what the fact was with regard to trust power. The Comptroller's records further show that the total capital, not including surplus, undivided profits, or other assets of the National Banks which went out of the National and into the State System in this manner, was $112,278,300. Of this amount, 35 National Banks had a capital of $1,000,000 or over; 169 Banks had a capital between $100,000 and $1,000,000, and 263 of these National Banks had a capital of less than $100,000.

attention thereto at this time chiefly for the purpose of showing that the adverse conditions of national bank operations, as to which my predecessor so urgently recommended remedial legislation, are becoming daily accentuated. The national banking system is a time-honored Federal instrumentality. The charter powers of the individual national banks are derived solely from the Congress. Twice in the history of the United States, namely, immediately after the Civil War and immediately preceding the World War, the Federal Government was able to enforce a banking policy at the time of great financial stress through its authority to use the national banking system as an instrument for the public benefit. The individual national bank is always ultimately able to take care of itself in meeting the competitive conditions due to more favorable State laws by giving up its national charter and going into the State System. But the gradual loss of national banks and the consequent decrease in relative resources of the national banking system are of primary concern to the National Government, not only because the national banks form the logical and permanent basis of the Federal Reserve System but also because only through the national banking system can there be maintained throughout the United States a standardized system of banking subject to the visitorial powers of the Federal Government and subservient at all times to the will of the Congress."

In his Report for 1926, the Comptroller, after reviewing the disadvantages under which the National banks were operating as compared with the State banks and the consequent temptation to them to operate under State charters, said at page 3:

"The national banking system should be adequate to meet all of the requirements for modern business and no national bank ought to be put in the position of being forced to yield its charter in order to carry on legitimate and necessary banking operations."

In his Report for 1927, the Comptroller summarized the methods by which the recommendations for the amendments contained in the Act of February 25, 1927, (44 Statutes 1225) were arrived at, and said, at page 2:

> "In the Comptroller's report for 1924 there was laid before Congress convincing evidence of the urgent need for the broadening of the charter powers of the national banks, as provided by the bill, in order to save the national banking system from ultimate extinction. That report showed that the national banks were gradually declining in relative strength, having during the preceding six years lost more than $2,230,000,000 to the State systems.
>
> "Subsequent developments during the three years the bill was before Congress served only to emphasize the trend toward disintegration in the national banking system. In my report to Congress for the year 1926 I pointed out that during the three year period ending with September, 1926, 253 national banks entered the State systems, taking with them aggregate resources of more than $1,000,000,000. The aggregate resources of the national banks had dropped from 75 per cent of the total of commercial banking resources in the United States in 1884 to about 46 per cent in 1926."

On April 26, 1924, the House Committee on Banking and Currency in its report recommending the passage of this Act said:

> "The national banking system is facing an emergency which affects its very existence and ultimately the existence of the Federal Reserve System. This situation is due to the fact that the national banks, operating under the law of 1864 with amendments, lack the necessary charter powers to give the most complete modern banking service. They are dependent solely upon Congress for these grants of power. Two kinds of legislation is urgently needed at this time—the one to permit national banks effectively to carry on the banking business and *the other to protect them in so*

far as Congress can do so from the inroads of competition from State member banks of the Federal Reserve system which are operating under charter powers granted by the State legislature.

"This bill is designed to meet this emergency by amending the national banking laws in several important particulars for the purpose of meeting the outstanding need of the national banks for more modern charter powers and by putting certain restraints on branch banking by State member banks in the Federal reserve system. The legislation here recommended would permit national banks to have more freedom in carrying on the banking business. The enlarged powers granted in this bill are along conservative lines and nothing is permitted which has not already been demonstrated to be sound banking." (House Report No. 583, 68th Congress, 1st Session, pp. 1 and 2).

And further:

"The enactment of this bill into law will put new life into the national banking system. The cumulative effect of its provisions will produce a situation in the Federal reserve system where the rights of the national banks will be more nearly on a par with those of the State member banks. When the Federal reserve act was amended to let State banks come into the Federal reserve system with their full charter powers, the national banks, operating under the old national bank act of 1864, found themselves, as compulsory members of the Federal Reserve System, placed at a considerable disadvantage. Many of these State banks are operating under modern banking codes. The amendments which had heretofore been made to the national bank act were not sufficient to enable the national banks to compete on terms of equality with such State member banks while at the same time they were compelled by law to bear the chief burden in supporting the Federal reserve system. * * *

"Your committee feels that this measure is of the greatest importance to the stability of our banking system and respectfully urge its early passage." (House Report No. 583, 68th Congress, 1st Session, pp. 4, 5.)

On May 31, 1924, the Senate Committee on Banking and Currency submitted a report upon the same bill which contains substantially identical recommendations for its passage. (See Senate Report No. 666, 68th Congress, 1st Session, pp. 1-2 and 7-8).

The bill having failed of passage in the 68th Congress, the House Committee on Banking and Currency submitted its report on the bill on January 12, 1926. The House Committee restated the purposes and necessity of the Act in substantially the same language as had been employed in the Reports of House and Senate Committees on the bill in the 68th Congress, but added "that the need for this legislation is even more urgent than it was during the last Congress and respectfully" urged its passage. (House Report No. 83, 69th Congress, 1st Session, pp. 6-7).

The Act, as finally approved, contains some twenty amendments to the National Banking Laws which were designed as a whole, to improve the charter powers and operating conditions of the national banks. The particular provision in question forms a part of an amendment to the Act of November 7, 1918 (which provided for consolidation of National banks), and provides for the consolidation of a State bank with a National bank under the national charter.

The history of this legislation shows that the congressional purpose was to preserve and render more secure the national banking system as an instrumentality of the Federal Government. Congress was confronted with a situation where the national banking system was declining, not only in its relative importance in the banking system of the nation, but absolutely, in the sense that its losses were exceeding its accretions. The Comptroller in his Report for 1926, p. 2, says:

"Last year I directed your attention to the fact that for the period from October 21, 1923, to October 17, 1925, 166 national banks left the national system to engage in the banking business under State charter, carrying with them aggregate resources of $566,600,000. It is with regret that I must now report that from October 17, 1925, to October 1, 1926, 87 national banks went into the State systems with aggregate resources of about $560,000,000. During the same period 29 State banks nationalized with aggregate resources of about $235,000,000."

See also Comptroller's Report for 1925, p. 3.

Congress recognized that this was a period of consolidation of financial institutions to enable them to meet the enlarged and constantly growing demands of trade and commerce. Competing State institutions were permitted to consolidate under the laws of the various states. The State laws permitted the consolidation of national banking associations with State banks under liberal State charters; and as a result the Federal Government was losing its instrumentalities. It was clear that if the Federal Government was not to lose its instrumentalities through such consolidations it must place them on a parity with State institutions with respect to such powers of consolidation. This could only be done by preserving all the rights and privileges of component State and National banks upon consolidation under Federal charter. There was thus involved not only the question of conferring upon the national banks appropriate and relevant private functions which Congress deemed essential or proper for the successful operation of national banks but there was also involved the necessity that Congress endow national banks with those powers, by way of consolidation, which would enable them to meet the competition through consolidation which had been created by the States.

But there is more involved here than the mere question of competition between individual national banks and individual State banks and trust companies. There is involved the larger question of competition between the Federal Government and the several States for the privilege of chartering and supervising banks. This is obvious when we consider the practical situation which led to the enactment by Congress of the provision here under consideration. This is an era of bank consolidations, and the tendency is strongly towards the creation of fewer and larger banks. In order to provide large banking institutions equipped to transact a banking business in all of its phases coupled with the business of a trust company, bankers are consolidating many national banks with State trust companies; and this is especially true with regard to the largest and most important banks. Whenever the directors of a national bank and a trust company meet together to decide upon a consolidation, the question arises whether the consolidated bank shall have a national charter or a State charter. The trust company nearly always has a large amount of trust business; it is usually handling many matters under the supervision of the probate courts as executor, administrator, trustee and guardian; is acting under private trust instruments as trustee, registrar and transfer agent; and has in its vaults many ambulatory wills naming it as executor, guardian and trustee. If there is any doubt about the right of the consolidated bank to continue to transact all of this business under a national charter, therefore, the directors will decide to effect the consolidation under a State charter; and the National Banking System will lose through these consolidations many of its largest and most important members. Stated differently, the Federal Government will lose many of the largest and most useful of the Federal instrumentalities created under the National Bank Act for the performance of its fiscal functions. Con-

gress fully appreciated this situation; and, in order to preserve the existence of the National Banking System, enacted this legislation so that persons about to consolidate a National bank with a State trust company would feel that they could safely retain the national charter without losing the trust business formerly held by the trust company.

Hence, the legitimate congressional purpose of preserving the Federal fiscal instrumentalities involved both the enlargement of the corporate powers of national banks to meet modern banking conditions and the creation of authority for the consolidation of State banks with national banks, under Federal charter, upon conditions which would preserve, in the consolidated national bank, all of the powers, rights and privileges held by the State institution, to the end that the Federal instrumentalities might be sustained as against the competition created by the States through the authorization of the consolidation of State banks on favorable terms.

B.

The extent of the power of Congress to create National Banks and endow them with private functions.

The principles here involved have been long established and are no longer open to debate.

First. Since *McCullouch v. Maryland*, 4 Wheat. 316, and *Osborne v. Bank*, 9 Wheat. 738, the power of Congress to create national banks as fiscal agencies of the Federal Government and to endow them with such private functions as in the judgment of Congress are relevant and appropriate to the banking business and which in the judgment of Congress are necessary or convenient to make the business of national banks successful, has never been doubted. *First National Bank v. Fellows*, 244 U. S. 416. Since

trust powers have been quite universally conferred upon state corporations which carry on businesses that are essentially of a banking nature, it is not open to argument but that such powers are so far relevant and appropriate to the successful operation of the banking business that Congress may in the exercise of its legislative discretion attach such powers to national banks for the purpose of insuring their successful operation.

Second. It is equally well established that although certain businesses or functions are of such a character that they are not inherently relevant or appropriate to the banking business so as to come within the foregoing rule, Congress nevertheless has the power to authorize national banks to carry on such business or to discharge such functions, wherever State laws authorize corporations which are rivals or quasi rivals of national banks to do so, in order to protect the national agency against actual or potential competition created by the State. *First National Bank v. Fellows*, 244 U. S. 416, 425-426.

Third. To the extent that Congress has power to endow national banks with functions of a private nature in order to secure their successful operation or to protect them from state competition under the foregoing rules, that power is paramount over the power of the State and deprives the State of the right to defeat or nullify the congressional action, directly or indirectly, through the exercise of the State power to regulate such private business, or through the exercise of the State power to control its courts. *First National Bank v. Fellows*, 244 U. S. 416 at 425; *Burnes National Bank v. Duncan*, 265 U. S. 17 at 24; *Fidelity National Bank & Trust Co. v. Enright*, 264 Fed. Rep. 236.

If there is to be any competition between the nation and the states, Congress has the last word. The business

of banking necessarily affects national interests and the national welfare, and nothing can stand in the way of national legislation reasonably adapted to the preservation of the dominant national interest. If the necessities of the situation justified it, Congress would have power to require all banks to take out national charters and thus to bring the whole business of banking under national control. *Veazie Bank v. Fenno*, 8 Wall. 533. As yet no such necessity has arisen; Congress has felt itself able to meet state competition by successive enlargements of the powers of national banks. As a lesser exercise of the same power Congress would have the power to provide generally that the national banks should have in each state, in addition to the powers specifically in national charters, all the powers given in that state to state banks. The inconvenience of such legislation is clear since it would subject the national banks in a state to variation in the local legislative policy, but the power of Congress to do this could hardly be open to dispute. In the presence of these large and plenary powers in Congress, it seems clear that the power exerted in the present Act is wholly within the competence of Congress.

C.

The power of Congress to create Federal fiscal agencies and endow them with relevant and appropriate functions, or to protect them against State created competition, by transmutation is as plenary as the Congressional power to create such instrumentalities by initial organization.

In *Casey v. Galli*, 94 U. S. 673 at 678, the court in discussing the plea that a national banking corporation which had been created by conversion of a State bank pursuant to Federal statute had no existence because there was no authority under State law for the conversion, said:

"The second plea is clearly bad. No authority from the State was necessary to enable the bank so to change its organization. The option to do that was given by the forty-fourth section of the Banking Act of Congress. (13 Stat. 112). The power there conferred was ample, and its validity cannot be doubted. The act is silent as to any assent or permission by the State. *It was as competent for Congress to authorize the transmutation as to create such institutions originally.*"

Since Congress has the power to create such agencies by transmutation, as well as by initial organization, it has the power to make the transmutation or consolidation effective by such means as in its discretion seem best. It is not permissible to isolate any particular attribute or incident of the consolidation for the purpose of determining whether Congress would have the power to create such an attribute or incident or deal with the subject thereof as an isolated matter, but the power of congress to attach such attribute or incident to the consolidation must be tested by considering the consolidation as an entirety and the power of Congress to authorize the consolidation. *First National Bank v. Fellows, supra.*

The means here employed by Congress, to make effective its power of creation by transmutation, were well within the scope of constitutional power. Such means are sustained both by the power of Congress to attach private functions which are relevant and appropriate to the banking business and by its power to attach still other private functions where necessary to meet competition. Massachusetts Trust Companies were permitted to consolidate or merge. *Massachusetts General Laws, Chap.* 172, Sec. 44.

As before pointed out, it was and is a period of consolidation of financial institutions to enable such institutions to meet the enlarged and constantly increasing de-

mands of trade and commerce. The tendency of people to transact all of their business with an institution which is able both through size and the extent of its powers to take care of all of their financial requirements has become pronounced. National banks were surrendering their Federal charters and consolidating with State institutions under State charters. Congress could only preserve and sustain the national instrumentalities by authorizing them to consolidate with State institutions under Federal charters in the same way and by preserving as an incident of such consolidation all of the rights, powers and privileges which were enjoyed by the absorbed State institution. Clearly, the transfer by operation of law of all such powers and privileges held and exercised by the State institution consolidated with the National Bank, could not be in contravention of State law because by the terms of the statute, the only powers, privileges and rights which were so transferred to the consolidated national corporation as an incident of the consolidation, were those which had been created by the State and were existing in the State corporation. This power of Congress to make effective and render practically available this power of creation by transmutation or consolidation is not, as has been shown, subject to indirect nullification by the power of the State to regulate the subject matter of the incidents of the consolidation or by the power of the State over its courts.

However, if the decision of the Massachusetts court be sustained, this power of Congress is indirectly but effectively defeated and nullified. Since the power of Congress to enact this legislation rests both upon its power to attach relevant and appropriate functions to national banks and to endow them with powers necessary to meet competition created by the State, it is clear that Congress is a *competent legislature* to act upon the subject matter to the extent and within the purview of this statute, and that the

legislation is within the scope of the Constitution. Hence, if this legislation is unconstitutional, it cannot be because it is not within the scope of congressional power, but must rest upon the contention that it violates some restrictive provision of the Federal Constitution. The only question which remains is whether a competent Legislature may provide such an incident of corporate consolidation.

D.

Congress may constitutionally provide for succession by a consolidated corporation, as an incident of the consolidation, to all rights as Trustee, Executor or Administrator which were held by the constituent or absorbed corporations.

The Supreme Judicial Court of Massachusetts does not contend that it would be beyond the power of a Legislature to prescribe, generally, the incidents or effect of the consolidation or merger of corporations which were created or authorized by that Legislature. Since it has been demonstrated that the Congress is a competent Legislature in this case, no further argument seems necessary. However, the constitutionality of such a power extending to fiduciary relationships is well established by authority.

In *Iowa Light H. & P. Co. v. The First National Bank of Boston*, 250 Mass. 353, 145 N. E. 433, the original Trustee under a trust mortgage (a Massachusetts Trust Company) had been converted into a national bank and then merged and consolidated with the defendant national bank. The court held that the defendant national bank "succeeded to all the rights, title and powers of the International Trust Company, and is the Trustee for the bondholders."

A similar result was reached in *Mercantile Trust Co. v. San Joaquin Agricultural Corp.*, 265 Pac 583, where the court said at page 588:

"It is true that each of the consolidated banking corporations, as a distinct, independent, and separate corporate entity, practically passes out of existence or becomes extinct upon the completion of the act of consolidation. But, unlike in cases of dissolution, their corporate activities do not cease but are continued and are prosecuted and carried on through a new channel—a channel created solely by their own voluntary act under the sanction of the law for that specific purpose. Speaking figuratively, the act of consolidation is merely the joint transfusing of the blood of the constituent corporations into the veins and arteries of a new single corporate entity, that they may enlarge and extend the scope and business ramifications of their own corporate purposes and also to impart enhanced solidity to their responsibility as banking and trust corporations."

At page 589:

"All corporations, as has also been stated, are organized with full knowledge by the people of all the laws governing the formation of corporations and the exercise of their rights and obligations thereunder, and therefore, in such an instance as we have here, the statute authorizing the consolidation or merger of banking corporations, insofar as it prescribed a scheme for the transfer of their properties, rights, agreements, obligations, duties, etc., to the consolidated corporation, enters into and becomes a part of every agreement or obligation entered into or assumed by the constituent corporations prior to the consolidation, and of this the defendant, its directors and bondholders are presumed to have known before and at the time of the execution of the trust deed. Indeed, in appointing the Savings Union Bank & Trust Company the trustee of the trust, the defendant and its officers and the holders of the bonds secured by said deed to or mortgage upon the lands therein described are to be held to have impliedly assented to the exercise of the legal right of said bank to merge into or consolidate with another banking corporation, with all

the consequences following such merger or consolidation as are prescribed by the law."

In *McElwain v. Primavera*, 167 N. Y. S. 815, the court in discussing the effect of consolidation of State banks under the New York Banking Laws, said:

> "'Dealing with the original banking corporation, the defendant subjected himself to the possibility of merger and the enforcement of the contract by the new corporation, which is new, so far as the defendant is concerned, in name only.' (*Bank of L. I. v. Young*, 101 App. Div. 88, 91 N. Y. S. 849).
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> "The provisions of Section 37 of the Banking law, quoted above, regulating the transfer and the vesting of property in a case where merger occurs, are very broad. The Legislature did not contemplate that the property of one bank merged in another should vest in the corporation in which the merger takes place by operation of any assignment, or that such transfer should be attended with the usual rules of law in respect to assignments. The scheme is that the corporation which is merged with another should *lose its identity only so far as its separate existence is concerned*, and that it should be swallowed up in the other and become an integral part thereof, carrying into the corporation which survived all its rights, powers, liabilities and assets, except the indicia and attributes of a corporate body distinct from that into which it is merged."

In *Chicago Title & Trust Co. v. Zinser*, 264 Ill. 31, 105 N. E. 718, the court held that it was competent for a Legislature to prescribe that as an incident of the consolidation or merger of trust corporations, the consolidated corporation succeeded to the right to be executor under unproved wills in which the absorbed trust company had been named as executor.

> "The material question here is whether the general rule that a trustee cannot delegate his authority to

another is an obstacle to the exercise of a power by the Appellee to act as executor or trustee where one of the constituent corporations was named as such. That general rule rests upon the ground that the selection of a trustee implies personal confidence in his discretion and judgment. If a power is given to an executor or trustee which is not ministerial or given for the purpose of executing a declared trust which the court can enforce but which involves the exercise of discretion and judgment, the power cannot be delegated or transferred to another, either by the trustee or a court. The rule, however, cannot be applied to the case of a corporation, because the element of trust in the judgment and discretion of an individual is entirely wanting. A corporation is without personality and if it is selected as trustee or executor there can be no reliance upon individual discretion or even upon the continuance of the same administration. Etta Nelson, in naming the Real Estate Title & Trust Co. as executor and trustee, knew that its directors, officers, and stockholders might change from time to time, and that the statute authorized a change of name or place of business, enlargement, or change of the object for which the corporation was formed, an increase or decrease of capital stock or change in the number of shares or par value, increase, or decrease of the number of directors, and the consolidation of the corporation with any other corporation then existing or that might thereafter be organized. She therefore contemplated that these changes might occur, and that the Real Estate Title & Trust Co. might be consolidated with some other corporation such as the Chicago Title & Trust Co., and that it would thereby cease to exist and become a component part of a new corporation. A consolidation took place and a new corporation was created from the original corporations, with an enlarged capital stock and unimpaired franchises."

Again *In Re Bergdorf's Will*, 206 N. Y. 309, 99 N. E. 714, the Court of Appeals of New York held that it was competent for the Legislature to prescribe that in case of

a merger of trust corporations, as an incident thereof, the resulting corporation succeeded to the right to be executor under an unproved will in which the absorbed corporation had been named as executor. The court pointed out that the solution depended on the intention of the Legislature and not upon the intention of the Testator, who must be presumed to have intended the result prescribed by the Legislature in the event of such a corporate merger.

In Re Turner's Estate, 277 Pa. St. 110, 120 Atl. 701, The Rittenhouse Trust Company, a Pennsylvania corporation, had been appointed guardian of certain minors by the court. Subsequently, the Trust Company was converted into a national bank which consolidated with The Corn Exchange National Bank. The latter bank, holding a permit to act as a fiduciary under the Federal Reserve Act, petitioned for payment of the funds of the minors to it. The court held that such national bank had a right to act as guardian and was entitled to have the funds paid to it, and that it was unnecessary for the national bank to agree to comply with the State laws with reference to trust funds because, since the right of the national bank to so act was established by paramount Federal law, the power to exercise the right followed as a necessary incident.

By an Act approved March 11, 1911 and entitled "An Act to Authorize The Old Colony Trust Company, The Massachusetts Trust Company, The Mercantile Trust Company and The City Trust Company to merge," the General Court of Massachusetts asserted the right to provide for the succession as executor of the resulting corporation in exactly the same way in which Congress has provided in the Act under discussion. The constitutionality of that Act of the General Court of Massachusetts has never been challenged.

In *Petition of Commonwealth Atlantic National Bank*, 249 Mass. 240, 144 N. E. 443, the court, in holding that the

consolidated national bank did not succeed to the right to act as the executor of an unproved will in which an absorbed State Trust Company had been named as executor, held that the Federal statute there involved was not explicit with respect to such right of succession under unproved wills, but conceded that the argument would be strong that a statute so providing by a competent legislative body would be effective. It has heretofore been established that the Congress is a competent Legislative body in this matter; the Massachusetts Court concedes that the Congress has now explicitly provided for such succession; it necessarily follows that such provision must be effective. Otherwise, the State may embarrass or defeat the exercise of a clear Federal power.

This case does not depend upon the technical preservation of a fictitious corporate identity. However, if that be material, there does not seem to be any insurmountable difficulty. It is well established that transmutation of a State bank into a national bank pursuant to congressional authority does not destroy the bank's identity or its corporate existence. *Metropolitan National Bank v. Claggett*, 141 U. S. 520; *Michigan Ins. Bank v. Eldred*, 143 U. S. 293; *Atlantic National Bank v. Harris*, 118 Mass. 147; *City National Bank v. Phelps*, 97 N. Y. 44.

Massachusetts General Laws, Chap. 172, Sec. 44, provides that upon any consolidation of a Massachusetts Trust Company, its charter "shall be void except for the purpose of discharging *existing obligations and liabilities.*" It is difficult to see why the duty to discharge an accepted trust as an executor or administrator is not an existing obligation. Hence, under the specific terms of the Massachusetts statute, the corporate identity of the Trust Company may well be considered to continue in the absorbing corporation, so far as is necessary, until the obligation is fully discharged. The discharge of the office of admin-

istrator has been specifically held to be a duty and *obligation* of the appointed corporation. *Worcester County National Bank In Re Parson's Estate* (Mass.) 161 N. E. 797.

The purpose of all statutory construction is to ascertain and carry out the intention of the legislature. The Massachusetts Court admits that Congress intended to provide for succession as executor. The reasonable construction is that it intended to provide for the continuation of the identity of the Massachusetts trust company in the consolidated national bank to the extent that that might be necessary to enable the consolidated institution to discharge the obligation of trustee, executor or administrator.

No question of the construction of wills is involved in this proceeding. However, if it were involved, it is clear that a competent Legislature might provide for the succession of the consolidated corporation as executor under an unproved will, and hence, clearly under an existing appointment as such executor. *Chicago Title & Trust Co. v. Zinser, supra; In Re Bergdorf's Estate, supra; In Re Turner's Estate, supra.* Congress is a competent legislative body in these circumstances; and its legislative determination with respect to succession of executors by national institutions must be equally as effective as the determination of state legislatures with respect to State corporations in similar consolidations or mergers.

Moreover, it is submitted, the Supreme Judicial Court attaches too great significance to the legal fiction of corporate entities. The doctrine of corporate entities is simply a convenient legal fiction. Corporations are the creatures of legislatures; their nature, powers, and attributes are simply what their creators say they are. Likewise, the consolidation or merger of these fictitious legal entities is the creature of the Legislature; and the effect, attributes and incidents of such consolidation or merger are just what the Legislature says they are. The nature of the

attributes and incidents of the consolidation depends upon the intention of the Legislature. *8 Thompson Corporations*, (3rd Ed.) Sec. 6016, pp. 73-74. The courts have never hesitated to look back of the legal fiction of corporate entities where necessary to avoid fraud, circumvention of statute, public wrong or evasion of statutory obligation. *Stockton, Attorney General v. Central Railroad Co., et al.*, 50 N. J. Eq. 52, 17 L. R. A. 97; *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 9 L. R. A. 33; *State ex rel. Attorney General v. Standard Oil Co.*, 49 O. S. 137, 15 L. R. A. 145; *People ex rel. Peabody v. Chicago Gas Trust Co.*, 130 Ill. 268, 8 L. R. A. 497; *United States v. Lehigh Valley R. R. Co.*, 220 U. S. 257; *Miller & Lux v. East Side Canal Co.*, 211 U. S. 293. Similarly, the Court will not hesitate to disregard legal fictions where they are invoked for the purpose of embarrassing Congress in the exercise of an admitted Federal Power. Since the intention of Congress to provide for the succession of the consolidated national bank as executor is clear, an artificial application of the doctrine of corporate entities will not be permitted to defeat the Federal power. A competent legislative body does not have to prescribe an amalgamation which falls in the class of a technical merger or technical consolidation, but it may prescribe any form, kind or degree of amalgamation which it sees fit. Where Congress has clearly manifested its intention, the statute will be so construed as to effect that intention even though the language be inartificial and the mere mechanics of the statutory method must yield to the plain intent.

The artificial character of the decision of the Massachusetts Court is well illustrated by *Petition of Worcester County National Bank In Re Parson's Estate*, 161 N. E. 797. In that case this identical national bank had been appointed administrator prior to its consolidation with the Fitchburg Bank and Trust Company. The Court,

in holding that its appointment as administrator continued unaffected by the consolidation because the corporate entity of the national bank was preserved, said:

> "Its financial resources may have been increased or diminished by the addition of the assets of the trust company and the assumption of its debts, but its *obligations* and duties, not arising out of the consolidation, abide in full force and effect as if there had been no consolidation. Among the duties and obligations which endure undisturbed by the consolidation is the trust to continue and finish the administration of the estate of the decedent."

This case furnishes a good measure of the weight of the arguments advanced by the Massachusetts Court in support of its proposition that the Worcester County National Bank could not be lawfully authorized to succeed the Fitchburg Bank and Trust Company, as executor, by operation of law. We have the spectacle of the identical national bank being held to have the right to continue to hold its appointment as administrator, subsequent to the consolidation, in one case on the ground that the appropriate legalistic words have been spoken to continue its fictitious corporate entity, while it is held, by the same court, in another case that although clearly provided by the legislature authorizing the consolidation, it cannot be lawfully authorized to continue the office of executor, subsequent to the consolidation, which was existing in the absorbed Trust Company, because the court must have the right to pass judicially upon the financial integrity, reputation and policy of the consolidated corporation. We have a case where, in fact, everything that had happened with respect to the financial standing, character and policy of the trustee corporation in the instant case, had likewise happened in the character, standing and policy of the corporate trustee in the case last cited. If the consolidated bank, the Worcester County National Bank, was unfit or incapaci-

tated to succeed to the executorship in the instant case by the operation of law because the changes incident to the consolidation required a fresh examination of its fitness by the Probate Court, how could the Worcester County National Bank be fitted to continue its duties as administrator in the Parson's Estate, subsequent to the consolidation, without a fresh judicial determination of its fitness by the Probate Court? The distinction sought to be found by the Supreme Judicial Court of Massachusetts in the instant case rests upon wholly artificial legal fictions.

None of the cases cited by the Supreme Judicial Court of Massachusetts, with respect to the division of powers among the several departments of the Government under the Federal Constitution, seem applicable or even relevant to the facts of this case. The cases hereinbefore cited in this section amply demonstrate that the provision for the succession as executor of the consolidated corporation as an incident of the consolidation is not an exercise of judicial power in contravention of the Constitution of the United States. (See particularly *In Re Turner's Estate*, *supra*, 277 Pa. 110, 120 Atl. 701; also *In Re Bergdorf's Will*, *supra*, 286 N. Y. 308, 99 N. E. 714; *Chicago Title & Trust Co. v. Zinser*, *supra*, 264 Ill. 31, 105 N. E. 718; *Mercantile Trust Co. v. San Joaquin Agricultural Corporation*, *supra*, (Cal.) 265 Pac. 583; *Iowa Light H. & P. Co. v. First National Bank of Boston*, *supra*, 250 Mass. 353, 145 N. E. 433; *McElwain v. Primavera*, *supra*, 167 N. Y. S. 815).

The conclusion of the Supreme Judicial Court of Massachusetts that the clause of *12 U. S. C. A., Chapter 2, Sec. 34a* which provides for the succession of the national bank as executor, by operation of law, is in contravention of the law of Massachusetts, is based upon the proposition that the appointment of an executor is an exercise of judicial power which it is incompetent for the Legislature to assume to perform. It is not claimed that this contravenes

any statute of Massachusetts. Part 1 of Article 30 of the Bill of Rights prohibits the Legislative Department from exercising judicial power. In reply to this, it may be observed that the statute under examination deals with the powers of consolidated corporations; and while it provides for succession it still leaves the executor subject to removal by the court in proper cases, so that the judicial power is not in any way interfered with. As a matter of fact courts do not appoint executors. *In Re Bergdorf's Will*, 206 N. Y. 309, 99 N. E. 714; *Parker v. Sears*, 117 Mass. 513; *National Bank v. Eldridge*, 115 Mass. 424. The right to act as executor or administrator of a decedent's estate is not a natural right, but resides first in the state, and the state may place the administration in the hands of its own officials and not leave them to administrators appointed by courts. *In re McWhirter's Estate*, 235 Ill. 607, 85 N. E. 918. This policy has been followed in several states and it is not always required that the Probate Court should be consulted in such matters. *Leever v. Taylor*, 111 Mo. 312, 19 S. W. 955; *Brinckwirth's Estate v. Troll*, 266 Mo. 473. Even in Massachusetts, under Section 17, Chapter 194 of Public Statutes, the public administrator proceeds summarily in estates under $100.00 in value without procuring Letters of Administration at all. The power of Legislatures to deal with trusts without infringing judicial power is illustrated in *Saydam v. Williamson*, 24 Howard 427; *Hoyt v. Sprague*, 103 U. S. 613; *Watkins v. Holman*, 16 Peters 25.

As a matter of fact the Legislature of Massachusetts has exercised the very power with regard to state institutions which Congress has sought to exercise in the Act under examination. By an Act approved March 11, 1911, The Old Colony Trust Company, The Massachusetts Trust Company, The Mercantile Trust Company and The City Trust Company were authorized to merge, and the Act expressly provided that all trusts, whether as executor or

administrator, trustee or otherwise, should inure to the merged corporation. The powers conferred by this act have been in operation covering a vast number of executorships and fiduciary relations of all kinds, and its validity has never been questioned.

Even the power of removal as to executors or administrators has been made the subject of statutory regulations. *Haddick v. District Court*, 160 Ia. 487, and see cases cited in note, *Annotated Cases 1915 D, pages 284 to 287; Dunlap v. Kennedy*, 10 Bush (Ky.) 539.

As a matter of fact the law is generally well settled to the effect that Probate Courts exercise powers granted them by legislation in the appointment of administrators and trustees, and in the supervision of decedents' estates; and it is equally well settled that all lawful changes in a corporate trustee or executor are held to have been within the legal contemplation and purview of the original order of appointment.

The alleged impropriety of the succession of the National Bank as executor in the instant case is based by the Massachusetts Court upon the following argument:

> "It is quite possible that none of the officers of the Fitchburg Bank and Trust Company, in reliance upon whose character, sagacity and skill the original appointment as executor was made in the case at bar, continue as officers of the national banking association. The stockholders hardly can be the same. Its general policy of business and trust administration may have been entirely altered. Its reputation with respect to these matters may have changed radically as a consequence of the consolidation."

Every change in the corporate executor which is set forth in the foregoing quotation could as readily take place if there had never been any change in the corporate structure of the Fitchburg Bank and Trust Company, yet it would hardly be contended that such changes taking place

within the original corporate structure of the corporate executor would *ipso facto* work a vacation of its appointment as such executor. Changes in the qualities of executors or trustees, corporate or individual, may give rise to an occasion for the exercise of the power of removal. The courts have continuing powers over trustees in the interest of the trusts. But the courts may not defeat the legislative policy of the state by removing trustees because of changes in their qualities authorized by law, unless the changes fairly affect the capacity of the trustee to execute the trust. If changes in the corporate organization or qualities of trust companies be held automatically to determine their trustee relations without the intervention of the court or agency through which the trust relation was created, then either the legislature must refrain from remodeling and controlling its corporate creatures or run the risk of confusion and loss to the estates held in trust at the time of any change. Such a construction in effect makes of a statute authorizing a change in a corporate trustee, a legislative removal of a trustee appointed by judicial proceedings.

Such a statute, therefore, is not the legislative performance of a judicial act but a legislative declaration of what the effect shall be of a law passed by the legislature and is, therefore, a statement of what the law is which the court is to administer. The legislature makes the law and the court applies it. The judicial function is to appoint, control and remove trustees in accordance with the law. With this function the act in question does not interfere. It merely changes the law which the court is to apply.

The real basis of the decision of the Massachusetts Court is set out in the following language:

> "That section, according to its plain interpretation, has a signal force and effect in its application to appointment of fiduciaries by courts of this commonwealth. That section requires the courts of this com-

monwealth to recognize and accept, without inquiry or hearing, as fiduciary in place of a state trust company now gone out of existence, which was appointed by the court by solemn decree, a national bank which is a different corporation established *under the laws of a different sovereignty possessed of different powers, owing allegiance to a different jurisdiction, governed by different laws, subject to different governmental supervision, and controlled by different officers.*"

The fact that there may be different corporate officers may be readily disregarded as immaterial for the reason that if there had been no consolidation, a change in corporate officers could as readily occur; and no one would contend that a change in corporate officers of a corporate executor works an abandonment or vacation of its appointment as executor or trustee. Every other consideration which is mentioned by the Massachusetts Court refers to matters and circumstances which would not be open to the consideration of the Probate Court if it were passing upon the appointment of such corporation as an administrator in the first instance, unless it can be said that the Massachusetts Court could discriminate against the petitioner because it is a National Bank. All of the considerations which are enumerated by the Massachusetts Court, except the reference to change in officers, amount simply to saying that it is a national instead of a state corporation. By asserting the right to consider its character as a national corporation in determining whether it should be appointed or continued as an executor, the Massachusetts Court is simply claiming the right to discriminate against it because it is a national corporation. That no such right exists in the State Court is well settled. *First National Bank v. Fellows*, 244 U. S. 416; *Barnes National Bank v. Duncan*, 265 U. S. 17; *Estate of Stanchfield*, 171 Wis. 553; *Hamilton v. State*, 94 Conn. 648, 110 Atl. 54; *In Re Turner's Estate*, 277 Pa. 110, 120 Atl. 701; *Fidelity National Bank v. Enright*, 264 Fed. 236.

III.

THE CONSTITUTIONALITY OF THE ACT IS LIKEWISE SUSTAINED BY THE CONTEMPORANEOUS INTERPRETATION AND APPLICATION OF THE ACT BY THE FEDERAL AGENCIES ENTRUSTED WITH ITS ADMINISTRATION.

The duty of interpreting and administering *12 U. S. C. A., Chapter 2, Sec. 34a* is imposed upon the Comptroller of the Currency and the Federal Reserve Board. The contemporaneous interpretation of the Act by both Federal agencies fully sustains Appellant's contention that the Act is constitutional. Their respective interpretations demonstrate that the purpose of the Act was within the scope of the Constitution, that the end was legitimate and that the means adopted were appropriate to that end. The Court is, of course, the final arbiter of the scope of the constitutional power of all departments of the government; the other coordinate departments of the Government are, however, entitled and compelled, in the first instance, to judge of the Constitution for themselves. This is peculiarly true of officers charged with the administration of a statute. The Comptroller had brought the evils, which the law was designed to remedy, to the attention of the Congress and was peculiarly familiar with the purposes and scope of the Act. Hence, the fact that the interpretation of the administrative officers supports the constitutionality of the Act is persuasive.

An opinion of the Comptroller of the Currency with reference to the scope and constitutionality of the McFadden Act is found on pages 267 to 271 of the Annual Report of the Federal Reserve Board for the year 1927. This Annual Report was submitted to the Speaker of the House of Representatives in accordance with the requirements of Sec. 10 of the Federal Reserve Act (U. S. C. Title 12, Chapter 3, Sec. 247). In his opinion the Comptroller said in part:

"Since the decision of the Supreme Court of Pennsylvania in the *Turner* case and, in view of the decisions of the Supreme Court of the United States as to the effect of the conversion of a State bank into a national bank, there is no doubt as to the right of a national bank resulting from the conversion of a State trust company to continue to handle the trust business already on the books of the trust company at the time of the conversion and to act in all fiduciary capacities in which the trust company had been appointed to act prior to the conversion.

Even prior to the enactment of the McFadden Bill, therefore, the only possible doubt about the matter was with respect to the right of the national bank to be appointed as executor, trustee, etc., under wills naming the trust company to act in such capacities which were executed prior to the conversion and were not admitted to probate until after the conversion. The only doubt on this question was raised by the decision of the Supreme Court of Massachusetts, in the case of the *Petition of the Commonwealth-Atlantic National Bank*, 144 N. E. 443. That case did not pass upon the right of a national bank to act in fiduciary capacities or its right to continue to handle trusts already vested in the trust company, but involved merely the right of a national bank to act as executor under a will executed prior to the conversion which named the trust company as executor. The Massachusetts Court recognized the fact that, under the decisions of the Supreme Court of the United States, the national bank was the same institution as the trust company and that the corporate existence of the trust company was continued in the national bank; but avoided holding that the national bank must be appointed executor by making its decision turn upon a construction of the will. In construing the will, the Court held that the testator intended to have a trust company organized under State law and governed by the provisions of the State law act as his executor, and that it would not be carrying out the intention of the testator to permit the national bank so to act.

In order to eliminate the doubt raised by the decision of the Supreme Court of Massachusetts, there was inserted in Section 1 of the McFadden Bill a provision to the effect that, where a State bank or trust company consolidates with a national bank * * *.

This provision was entirely unnecessary as to business already on the books of the trust company; because under court decisions rendered prior to the enactment of the McFadden Bill, it was held that the consolidated national bank could continue to handle all such business. I have no doubt, therefore, that the courts will take cognizance of this fact and will construe the above quoted provision of the McFadden Bill to have the effect that it was intended to have, viz: **To prevent the State courts from refusing to appoint national banks as executors, trustees, etc., under wills naming trust companies to act in such capacities, where such trust companies have been converted into or consolidated with national banks before such wills are probated.**

Nor have I any doubt as to the constitutionality of this provision of the McFadden Bill. National banks are instrumentalities of the Federal Government created by Congress to perform certain essential functions for the Federal Government, and the Supreme Court of the United States has repeatedly held that Congress may enact whatever legislation is necessary to preserve their existence. The decision of the Massachusetts Court having raised doubts as to the rights of converted or consolidated national banks *which might cause persons seeking to consolidate trust companies with national banks to prefer State charters thereby depriving the Federal Government of its instrumentalities*, there can be no doubt of the constitutional power of Congress to eliminate this doubt by enacting the above-quoted provision of the McFadden Bill. As said by the Supreme Court of the United States in *First National Bank v. Fellows, supra:*

> "* * * This must be since the State may not by legislation create a condition as to a particular business which would bring about actual or potential

competition with the business of national banks and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency.'

If any one has any doubt of the power of Congress thus to interfere with the appointment of executors, trustees, etc., by the State courts, the answer is to be found in the following language of the Supreme Court of the United States in *State of Missouri ex rel. Burnes National Bank v. Duncan, supra:*

'The State cannot lay hold of its general control of administration to deprive national banks of their power to compete that Congress is authorized to sustain.' "

The Federal Reserve Board in the discharge of its statutory duty promulgated the following regulation as supplemental to *12 U. S. C. A., Chapter 2, Sec. 34a:*

"The purpose of this provision is to make clear the right of such a consolidated national bank to succeed to the specific trusteeships, executorships, and other fiduciary appointments under which the State institution was acting prior to the consolidation or in which it had been appointed or designated to act under wills or other instruments which had not became effective at the time of consolidation through the death of a testator, the probate of a will or otherwise; but it does not confer upon such national banks the right to act generally in fiduciary capacities or to undertake any new trust business. It is necessary for the consolidated national bank to have a permit from the Federal Reserve Board to act in fiduciary capacities, therefore, before undertaking to act generally in fiduciary capacities or to accept any new trust business. If the national bank does not desire to act generally in fiduciary capacities or to accept any new trust business, but desires merely to continue to execute the specific trusteeships, executorships, and other fiduciary affairs which were actually being executed by the

State institution at the time of the consolidation or which the State institution had been designated to execute under wills or other instruments which had not yet become effective through the death of the testator, the probate of the will or otherwise, it is not technically necessary for the national bank to have a permit from the Federal Reserve Board in order to execute such specific trusts; but it is advisable for the national bank to have such a permit, in order that its right to continue to execute these trusts may not be questioned. In all cases involving the consolidation of a State institution having a trust business with a national bank under the provisions of the abovementioned act, therefore, the national bank should obtain from the Federal Reserve Board a permit to act in fiduciary capacities before the consolidation becomes effective, unless such national bank already has such a permit."

Annual Report, Federal Reserve Board, 1927, p. 287.

Thus we find that the respective interpretations of this Act by the Comptroller of the Currency and The Federal Reserve Board are in agreement and support the conclusion that the Act is constitutional. It is likewise apparent that great interests have been created, in reliance upon such interpretation and administration of the Act by these Federal agencies, which would be seriously injured, if not destroyed, by judicial declaration that this law is unconstitutional. These circumstances are, of course, not controlling upon the Court, yet they would be entitled to great weight if the statute were of doubtful constitutionality. It is submitted that it is unnecessary to resort to such considerations in this case because the statute is clearly constitutional; nevertheless they are persuasive confirmation of the correctness of that conclusion.

CONCLUSION.

In conclusion we submit that the only material question in this case is the constitutionality of the statute under which the consolidation of the Worcester County National Bank took place. That Congress has the power to create National Banks, and to enact whatever legislation is necessary to preserve their existence, is conclusively established by the decisions of this Court.

We have shown that the legislation here under examination is necessary for the preservation of the National Banking System, since without it the Federal government would lose these indispensable federal instrumentalities through their consolidation with State Banks and Trust Companies under state charters instead of under national charters. We, therefore, submit that the legislation is not only appropriate, but is necessary to the preservation of the National Banking System and of the Federal Reserve System, and is clearly constitutional.

Respectfully submitted,

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